ARIZONA SUPREME COURT

NO. 18–0508–PR

STATE OF ARIZONA, Appellee, v. BOBBY RAY CARTER, Appellant.	Court of Appeals No. 2 CA–CR 2017–0149 Cochise County Superior Court Nos. CR–201500022, CR–201500023

THE STATE OF ARIZONA'S PETITION FOR REVIEW

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I. ISSUES PRESENTED FOR REVIEW.

> Should this Court grant review or, at minimum, order that the court of appeals' opinion be depublished, where the court **(1)** erroneously held as an apparent issue of first impression that the comprehensive and unitary crime of theft is a lesser included offense of the factually narrow crime of theft of a means of transportation under the double-jeopardy/*Blockburger* same-elements test; **(2)** disagreed with its prior opinion in *State v. Garcia*, 235 Ariz. 627 (App. 2014), that theft of a means of transportation is a lesser included offense of robbery under the same-elements test, thereby creating a split of authority; and **(3)** reached the untenable conclusion that the Arizona Legislature intended that an offense on which it has affirmatively imposed a more serious penalty than the penalty imposed on another, public-policy-distinct offense should be subsumed/nullified by that lesser and distinct offense for multiple-punishment purposes?

II. RESOLUTION OF THE ISSUES PRESENTED.

The court of appeals resolved all issues it *sua sponte* ordered the parties to address.

III. FACTS MATERIAL TO THE ISSUE PRESENTED.

Appellant Bobby Ray Carter engaged in a crime spree during which he, among other things, stole a person's tractor and carjacked/robbed another person of her Hummer SUV. (R.T. 2/7/17, at 111–20, 123; R.T. 2/8/17, at 25, 144, 177–81.) For stealing the tractor, Carter was convicted of theft of property with a value of $25,000 or more under the comprehensive and unitary theft statute, A.R.S. § 13–

1802,[1] and with theft of a means of transportation under A.R.S. § 13–1814. (R.O.A. 179; R.T. 2/14/17, at 19.) Theft of property with a value of $25,000 or more is a class-2-felony offense, while theft of a means of transportation is only a class-3-felony offense. For carjacking the SUV, Carter was convicted of theft of property with a value for $4,000 or more but less than $25,000, theft of a means of transportation, and (unarmed) robbery under A.R.S. § 13–1901. (R.O.A. 179; R.T. 2/14/17, at 17–19.) The two thefts involving the SUV are class-3-felony offenses, while robbery is only a class-4-felony offense.

After Carter's counsel filed an *Anders* brief on appeal, the court of appeals ordered the parties to address whether the two convictions involving the tractor violate double-jeopardy principles and whether the three offenses involving the SUV violate double-jeopardy principles—an inquiry to ascertain whether the Arizona Legislature intended multiple punishments on those three types of

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[1] *See State v. Kalauli*, 243 Ariz. 521, 524–25, ¶ 10 (App. 2018) ("theft as defined in A.R.S. § 13–1802 is a single unified offense, which means that the statute ***identifies a single crime*** and [merely] provide[s] more than one means of committing the crime") (internal citation and quotation marks omitted; emphasis and first alteration added); *see also State v. Tramble*, 144 Ariz. 48, 52 (1985) ("[I]n adopting A.R.S. § 13–1802[,] the legislature has created a single crime of "theft," combining or merging the common law crimes of larceny, fraud, embezzlement, obtaining money by false pretenses, and other similar offenses.").

offenses.[2] The court also directed the parties to address its holding in *State v. Garcia*, 235 Ariz. 627 (App. 2014), that theft of a means of transportation is a lesser included offense of (armed) robbery under *Blockburger*'s[3] same-elements test and, thus, that convictions for the two offenses violate multiple-punishment/double-jeopardy principles.

In his response, Carter cited favorably to and relied on *Garcia*, thereby implying that it had been correctly decided. (Carter's Supplemental Brief at 3.) He also (erroneously) contended that, under the double-jeopardy/*Blockburger* same-elements test: **(1)** the more serious class-2-felony theft of the tractor under § 13–1802 is a lesser included offense of the corresponding class-3-felony theft of a means of transportation, **(2)** the class-3-felony theft of the SUV under § 13–1802 is a lesser included offense of the corresponding class-3-felony theft of a means of transportation, and **(3)** both class-3-felony thefts involving the SUV are lesser included offenses of the class-4-felony robbery. (*Id.* at 3–4.) Accordingly, Carter

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[2] *See Ohio v. Johnson*, 467 U.S. 493, 499 (1984) ("In contrast to the double jeopardy protection against multiple trials, the . . . protection against cumulative punishment . . . is designed [solely] to ensure that the sentencing discretion of courts is confined to the limits established by the legislature, [and, thus,] . . . the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent.").

[3] *Blockburger v. United States*, 284 U.S. 299 (1932).

contended: **(1)** the class-2-felony theft-of-the-tractor conviction under § 13–1802 should be vacated as a lesser included offense of the corresponding class-3-felony theft-of-a-means-of-transportation conviction, and **(2)** both class-3-felony theft convictions involving the SUV should be vacated as lesser included offenses of the class-4-felony robbery conviction. (*Id.*)

The State asserted that *Garcia* had been incorrectly decided and that none of the convictions otherwise violated double-jeopardy principles under legislative-intent-based multiple-punishment analysis. (State's Supplemental Brief at 4–13.)

In a published opinion, the court of appeals agreed with the State that it had erroneously held in *Garcia* that theft of a means of transportation is a lesser included offense of (armed) robbery under *Blockburger*'s same-elements test because, notwithstanding *Garcia*'s conclusion to the contrary, the theft-of-a-means-of-transportation statute contains two elements, theft of a means of transportation specifically and the intent to permanently deprive the owner of that property, that are not contained in the robbery statute, and, thus, it is possible to commit robbery without necessarily committing theft of a means of transportation.[4] *State v. Carter*,

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[4] *See State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, ¶ 11 (App. 1998) (for purposes of double-jeopardy/*Blockburger* analysis, an included offense "is one composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the [greater] crime . . . without having committed the lesser one") (internal quotation marks omitted).

No. 2 CA–CR 2017–0149, 2018 WL 4496341, at *5–6, 8–9, ¶¶ 20–30, 35–38 (Ariz. App. Sep. 19, 2018).

Regarding whether each of the two theft offenses under § 13–1802 (involving the tractor and SUV, respectively) and each corresponding theft-of-a-means-of-transportation offense are included offenses of one another, the court ***purportedly*** applied the double-jeopardy/*Blockburger* same-elements test (the only test available for multiple-punishment/double-jeopardy purposes) in finding as an apparent issue of first impression that theft under § 13–1802 is a lesser included offense of theft of a means of transportation. *Carter*, at ¶¶ 31–34, 38. That precedent-setting holding is facially erroneous because **(1)** the same-elements test looks solely to the elements enumerated in the respective statutes under consideration—without regard to the factual bases of the offenses and/or the particularity/specificity or lack thereof in any particular charging document—and **(2)** the comprehensive and unitary theft statute, § 13–1802, contains enumerated elements under all but one of its alternative means (theft by control of any and all types of property) that are not contained in the factually narrow theft-of-a-means-of-transportation statute. As such, theft under § 13–1802 is ***not*** an included offense of theft of a means of transportation under the same-elements test because it is possible to commit theft of a means of transportation without also committing theft under § 13–1802, *e.g.*, theft under the latter statute involving embezzlement or

obtaining services of another by material misrepresentation. Likewise, although the court of appeals found to the contrary, *id.* at ¶ 35, because theft under § 13–1802 contains enumerated elements that are not contained in the robbery statute, theft under § 13–1802 is not an included offense of robbery under the same-elements test.

Because theft under § 13–1802 is not an included offense of either theft of a means of transportation or robbery under *Blockburger*'s same-elements test, it can be deemed an included offense of those other offenses only under certain case-specific, factually narrow scenarios, as reflected either in the information that a state agency in its largely unfettered discretion has included in a particular charging document (the charging-document test) and/or the evidence presented at a particular trial. But the United States Supreme Court held in *Dixon v. United States*, 509 U.S. 688, 702–11 & n.12–13 (1993), that the sole "included" offense test for multiple-punishment/double-jeopardy purposes is the *Blockburger* same-elements test.[5] Accordingly, even had the court of appeals explicitly analyzed the

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[5] *See State v. Sanders*, 205 Ariz. 208, 222, ¶ 65 (App. 2003) ("The *Dixon* case held that a 'same elements' test as promulgated in *Blockburger* . . . , is the ***only*** permissible interpretation of the double jeopardy clause.") (emphasis added); *State v. Cook*, 185 Ariz. 358, 361 (App. 1995) ("The *Blockburger* same-elements test focuses on the statutory elements of the two crimes charged, not on the factual proof that is offered or relied upon to secure a conviction."); *see also Grimstead v. State*, 684 N.E.2d 482, 486 (Ind. 1997) ("[R]eview of multiple punishments under (continued ...)

charged offenses under the charging-document/narrow-factual-focus test (as it implicitly did, in fact, do), any such test would have been immaterial for multiple-punishment/double-jeopardy purposes under United States Supreme Court law.

Having (erroneously) concluded that theft under § 13–1802 is an included offense of both theft of a means of transportation and robbery under the double-jeopardy/*Blockburger* same-elements test, the court turned to the State's argument that class-2-felony theft under § 13–1802 is not otherwise a lesser offense of either class-3-felony theft of a means of transportation or class-4-felony robbery due to its greater seriousness/penalty, in accord with **(1)** the court of appeals' express reasoning to that effect in *State v. Siddle*, 202 Ariz. 512, 516, ¶ 11 (App. 2002)[6]; **(2)** the Eighth and Ninth Circuit Court of Appeals' same reasoning to that effect[7];

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the Double Jeopardy Clause of the Federal Constitution requires that we look ***only*** to the relevant statutes in applying *Blockburger*, ***and no further***. The factual elements in the charging instrument and jury instructions are not part of this inquiry.") (emphasis added).

[6] *See Siddle*, 202 Ariz. at 516, ¶ 11 (for purposes of the double-jeopardy/*Blockburger* test, "the drug offenses here are greater offenses than the weapons offense ***by reason of felony classification***," and, thus, they are not lesser included offenses of the weapons offense) (emphasis added); *see also id.* (quoting *Chabolla-Hinojosa*, 192 Ariz. at 363, ¶ 12, for the proposition that "[a] lesser-included offense can have ***the same or lesser penalty*** as the greater offense") (emphasis added).

[7] *See, e.g., United States v. Cady*, 495 F.2d 742, 747 (8th Cir. 1974) ("The lesser included offense must be ***both*** lesser and included[: t]hese requirements can only (continued ...)

(3) and the fundamental rule of statutory/rule construction that no word or phrase be deemed redundant or otherwise inconsequential, as would be the case if the terms "lesser" and "included" essentially mean the same thing, *i.e.*, both terms separately and independently connote a "lesser" (as opposed to the more grammatically appropriate "fewer") number of elements.[8]

The court rejected that relative-seriousness-of-the-offenses argument without any meaningful substantive analysis based on its citation to rather summary (and apparently never revisited) reasoning by this Court 40 years ago in *State v. Caudillo*, 124 Ariz. 410, 412–13 (1979), that, "[a]lthough, coincidentally, an included offense often carries a less severe penalty, [the court] find[s] nothing in the statutes or in our jurisprudence that mandates such a conclusion," and, thus, "[t]he terms 'lesser' and 'greater' actually refer to the number of elements in the

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be met where the included offense involves fewer of the same constituent elements as the charged greater offense ***and*** where the claimed lesser offense has a lighter penalty attached to it than does the charged offense.") (emphasis added); *James v. United States*, 238 F.2d 681, 683 (9th Cir. 1956) (in refusing to find a merger of two charged offenses, the Ninth Circuit "was not disposed to hold that the included offense rule is meant to apply where the claimed 'lesser' or included offense prescribes a greater minimum punishment than the so-called 'greater' or including offense").

[8] *See Google* online dictionary, viewed on November 20, 2018 (exclusively defining the term "lesser" as "not so great or important as the other or the rest," "lower in terms of rank or quality," or connoting "animals and plants that are smaller than similar kinds").

respective crimes because the offense charged must contain all the elements of the included offense plus at least one additional element."

Although it is well settled that a lower court is bound by an opinion of a higher court, the court of appeals did not independently address whether the Arizona Legislature had intended that the more serious but (ostensibly) lesser included offense of class-2-felony theft should be subsumed/nullified by the less serious but "greater" offenses of theft of a means of transportation and robbery under multiple-punishment principles. The court failed to engage in that analysis notwithstanding that: **(1)** it expressly cited to *Albernaz v. United States*, 450 U.S. 333, 340–42 (1981), for the proposition that the same-elements test merely provides a presumption that a legislature intended to preclude multiple convictions for an offense and its lesser included that can be rebutted by contrary legislative intent, *Carter*, at ¶ 14; **(2)** no rational basis exists for the Arizona Legislature to permit multiple punishment for the offenses of theft of a means of transportation and robbery but not for *all* other forms of theft and robbery; **(3)** property crimes such as theft and crimes of violence like robbery otherwise address separate and distinct public-policy concerns[9]; and **(4)** *Caudillo* held (in the non-double-jeopardy

[9] *See Ball v. United States*, 429 A.2d 1353, 1359–60 (D.C. Cir. 1981) (in finding that Congress had not intended to preclude multiple punishment on the two charged offenses for double jeopardy purposes, the District of Columbia Circuit (continued ...)

context) only that "whether the penalty ***is less or the same***, an offense is necessarily included if all the elements thereof are contained within the elements necessary to prove the offense charged" and did not otherwise engage in legislative-intent-based multiple-punishment analysis. 124 Ariz. at 413 (emphasis added).

Having found that class-2-felony theft under § 13–1802 is both a "lesser" and an "included" offense of theft of a means of transportation and robbery (and, indeed, that the terms redundantly mean the same thing) and without otherwise addressing the Arizona Legislature's intent with respect to potential multiple punishment on the theft offenses and other charged offenses, the court of appeals turned to the appropriate remedial action. *Carter*, at ¶¶ 46–47. The court expressly recognized the incongruity of negating/vacating the conviction for the criminal offense—class-2-felony theft of the tractor—that the Arizona Legislature has deemed to be the most serious of those charged in this case, and, thus, it *affirmed* that class-2-felony theft conviction and vacated the conviction for the class-3-felony theft-of-a-means-of-transportation offense of which the class-2-felony offense is (purportedly) a lesser included. *Id.* Furthering the incongruity of the court's remedy in this case, the court flipped the script with respect to the SUV-

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Court of Appeals relied, in part, on the fact that the two offenses addressed separate and distinct public-policy concerns).

based convictions by *vacating* the class-3-felony theft conviction and affirming the class-3-felony theft-of-a-means-of-transportation conviction. *Id.* In so doing, the court was also able to affirm the class-4-felony robbery conviction involving the SUV based on its finding that, unlike theft under § 13–1802, theft of a means of transportation is (uniquely) not a lesser included offense of robbery.[10] *Id.*

IV. REASONS THIS COURT SHOULD GRANT REVIEW.

This Court's review is compelled by the fact that the court of appeals, in a precedent-setting opinion, misapplied the double-jeopardy/*Blockburger* same-elements test on an apparent issue of first impression—whether the comprehensive and unitary crime of theft is a lesser included offense of the factually narrow crime of theft of a means of transportation—by essentially conflating it with the immaterial charging-document/narrow-factual-focus test. This Court's review is separately and independently compelled by the fact that a conflict now exists in

[10] Left unspoken was the fact that, had the theft of the SUV been a class-2-felony offense instead of a class-3-felony offense, the court's lesser-included-offense analysis would have necessitated the Hobson's Choice of either: **(1)** vacating that class-2-felony conviction, the most serious of the three convictions, in order to retain both of the less serious convictions for theft of a means of transportation and robbery or **(2)** retaining the class-2-felony theft conviction and vacating the two convictions on the other less serious offenses of which the theft is (purportedly) a lesser included, thereby retaining only the high-value property crime and vacating the public-policy-distinct crime of violence.

court of appeals' opinions regarding whether theft of a means of transportation is a lesser included offense of robbery under the same-elements test.

Moreover, because in *Carter* the court of appeals did not recognize or otherwise acknowledge that, in analyzing whether theft under § 13–1802 is a lesser included offense of theft of a means of transportation, it was actually applying the charging-document test (and not the same-elements test), the court did not address as a threshold matter whether the charging-document test is even applicable in the context of multiple-punishment/double-jeopardy analysis. But because the court did, in effect, apply the charging-document test, it implicitly held that such analysis is appropriate, thereby widening the preexisting split of authority between various panels of the court of appeals on whether, following the Supreme Court's opinion in *Dixon*, the *Blockburger*/same-elements test is the sole test for multiple-punishment/double-jeopardy purposes. *See State v. Price*, 218 Ariz. 311, 313, ¶ 5 & n.1 (App. 2008) (agreeing with *Sanders*, 205 Ariz. at 222, ¶ 65, that the same-elements test is the sole test for multiple-punishment/double-jeopardy purposes under *Dixon*, but noting that various panels of the court of appeals had taken inconsistent approaches over the years on whether, post *Dixon*, the charging-

document test is applicable for multiple-punishment/double-jeopardy purposes).[11] That ever-widening split of authority provides yet another compelling reason for this Court's review.

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[11] Although it appears that the court of appeals panels that, as noted in *Price*, had continued post-*Dixon* to apply the charging-document test in the multiple-punishment/double-jeopardy context had simply failed to apprehend the holding or relevance of that Supreme Court precedent, the court in *State v. Ortega*, 220 Ariz. 320, 325, ¶¶ 13–14 (App. 2008), expressly acknowledged that, under *Dixon*, the *Blockburger* same-elements test "prohibits consideration of the underlying facts or conduct" of the charged offenses. The court opined, nevertheless, that the *Blockburger* same-elements test "does not [otherwise] preclude consideration of the offense as it has been charged in determining the elements of an offense and whether two offenses are the same." *Ortega*, at ¶ 14.

The State agrees with *Ortega* to the extent that one must often look to the charging document to obtain the information necessary to ***apply*** the same-elements test, *e.g.*, to determine whether two assault charges involving a single victim and a single act pertain to the separately chargeable crimes of assault causing physical injury and assault causing the reasonable apprehension of imminent physical injury, as opposed to unlawfully/erroneously doubling-up on one of those separate crimes. However, to the extent that *Ortega* also appears to suggest that the double-jeopardy/*Blockburger* same-elements test permits a court to use information gleaned from a charging document—*e.g.*, a factual recitation or a functionally equivalent citation to a particular alternative-means subsection within a unitary-offense statute—for the ***express purpose*** of conducting a lesser-included-offense analysis limited to that narrow factual basis, any such suggestion is clearly erroneous because such analysis is precluded under the same-elements test and, accordingly, is appropriate only under the separate and distinct charging-document test. *See, e.g.*, *Grimstead*, 684 N.E.2d at 486 (Ind. 1997) (under *Dixon*, "the factual elements in the charging instrument and jury instructions are not part of th[e *Blockburger* same-elements-test] inquiry").

Finally, this Court need not necessarily revisit the meaning of the terms "lesser" and "greater" and/or the legislative-intent-based significance of the relative penalties imposed on, or and public-policy-distinct goals of, the charged offenses in this case if it agrees with the State that the comprehensive and unitary crime of theft is not an "included" offense of either theft of a means of transportation or robbery under the *Blockburger* same-elements test. However, the fact that the court of appeals' resolution of those issues could potentially be dispositive in other cases not involving a unitary-offense statute like theft provides yet another reason to grant review.

V. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court grant review or, at minimum, depublish the court of appeals' opinion.

RESPECTFULLY SUBMITTED this 26th of November, 2018.

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APPENDIX A

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